

CRIMINAL REVISION.

Thomson J. : — The facts in each of these five cases are the same. In each of them the accused was charged with "failing" to attend the Magistrate's Court at Teluk Anson in answer to a summons which was alleged to be a contravention of section 174 of the Penal Code. In each case the accused pleaded guilty and, although no conviction appears on any of the records, was fined.

If these persons were convicted the convictions cannot stand.

In the first place "failing" to attend a Magistrate's Court in answer to a summons is not an offence. The offence is to "intentionally omit" to attend, which is a different thing.

There is, however, a much more fundamental defect in the proceedings. It would appear that the Magistrate before whom the accused failed to attend was in each case the same Magistrate who later tried them on the present charges. This was in direct contravention of section 359 of the Criminal Procedure Code, the provisions of which are mandatory. The Magistrate in question had thus no jurisdiction.

In the circumstances the convictions (if any) are quashed and the fines will be refunded.

Before departing from the cases I would point out that in each case a large number of particulars required to be entered on the Charge Sheet have not been entered, the most glaring of these omissions being any note of the Magistrate's finding. These Charge Sheets were introduced some years ago to ensure that all necessary particulars relating to criminal proceedings are recorded but this result which is a necessary one will clearly not be attained if Magistrates feel themselves at liberty to disregard the requirements of the Sheets.

Order accordingly.

CHAN PEAN LEON v. PUBLIC PROSECUTOR

[A. Cr. J. (Thomson J.) July 6, 1956]

[Ipoh — Criminal Appeal No. 38 of 1956]

Common Gaming Houses Ordinance, 1953, s. 4(1)(c) — Assisting in carrying on a public lottery — Possession of lottery tickets — Meaning of possession.

In this case the accused was convicted on a charge of assisting in carrying on a public lottery in contravention of section 4(1)(c) of the Common Gaming Houses Ordinance. The facts in the case were as follows: On March 10, 1956 the police raided a shop in Teluk Anson which belongs to a partnership of which the appellant is a member and in connection with which he acts as cashier. The appellant was found sitting at a small counter at the back of the shop. In front of him was

a small note-book containing 50 sheets of smooth paper and 50 sheets of rough paper bound alternately, the sheets of smooth paper being perforated near the binding so as to permit easy removal. Nothing was written on any of these sheets. In a waste-paper basket beside the appellant was found a day book of the type commonly used in shops which was completely filled with entries relating to trade transactions which had clearly been transferred to other books of account and inside this was found a booklet similar to the one lying in front of the appellant. From this booklet 17 of the smooth sheets were missing and the rough sheets corresponding to these missing sheets were inscribed with certain characters through the medium of carbon paper of which a sheet was found in the book. These characters were stated by an expert to relate to characters lottery. The appellant in his evidence said that a number of people besides himself had access to the waste-paper basket and that the table in front of him was used by other people.

Held: (1) it was clear that the Magistrate in this case had not applied his mind to the question of whether the circumstances clearly showed that the accused had the intention of dealing with the counterfoils found in the account book in the waste-paper basket as if they were his own, and that he had any *animus possidendi* in relation to them; (2) on the facts it did not appear that the Magistrate could have come to the conclusion that possession was made out against the accused had he directed himself to the question and therefore the conviction must be set aside.

To establish "possession" for the purposes of criminal law two separate questions are involved. The first is whether the accused party was in possession of the article in question and the second, by reason of the application of the maxim *actus non facit reum nisi mens sit rea*, is whether he had knowledge of the nature of the thing possessed.

Cases referred to:—

- (1) *Public Prosecutor v. Lee Fook* (1932) M.L.J. 127; (1931-32) F.M.S.L.R. 289.
- (2) *Toh Ah Lam & Mak Thim v. R.* (1949) M.L.J. 54.
- (3) *Lee Boon Gan v. R.* (1954) M.L.J. 103.

MAGISTRATE'S CRIMINAL APPEAL.

A. S. Yeo for the appellant.

Abdul Aziz (Federal Counsel) for the respondent.

Thomson J. : — This is an appeal from the Magistrate's Court at Teluk Anson. The appellant was convicted of assisting in carrying on a public lottery in contravention of section 4(1)(c) of the Common Gaming Houses Ordinance and was fined \$1,500 or six months imprisonment in default of payment. Against that conviction and sentence he has now appealed.

There has at no time been any material dispute as to the facts of the case.

During the morning of March 10th, 1956, police officers entered a shop in Teluk Anson which belongs to a partnership of which the appellant is a member and in connection with which he acts as cashier. The appellant was found sitting at a small counter at the back of the shop. In front of him was a small note-book containing 50 sheets of smooth paper and 50 sheets

of rough paper bound alternately, the sheets of smooth paper being perforated near the binding so as to permit easy removal. Nothing was written on any of these sheets. In a waste-paper basket beside the appellant was found a Day Book of the type commonly used in shops which was completely filled with entries relating to trade transactions which had clearly been transferred to other books of account and inside this was found a booklet similar to the one lying in front of the appellant. From this booklet 17 of the smooth perforated sheets were missing and the rough sheets corresponding to these missing sheets were inscribed with certain characters through the medium of carbon paper of which a sheet was found in the book. These characters were stated by an expert witness to relate to our old friend the characters lottery and it has never been in dispute that these rough sheets were duplicates of characters lottery tickets.

In addition, there was produced a piece of paper which was clearly the original of one of these duplicate tickets but on which appeared in addition to the material appearing on the duplicate the figures "10/3" possibly in a different handwriting and certainly written with a different instrument from the other characters on the paper.

The appellant himself gave evidence. He said, and this was at no time in dispute, that a number of other people beside himself had access to the waste-paper basket and that the table in front of him was used by other people. But he was at some pains (and he was represented by counsel) to avoid any direct denial of the charge.

If the duplicates of tickets found in the account book in the waste-paper basket were found in the possession of the appellant then the well-known presumption contained in section 11 of the Ordinance clearly arose against him. As, however, there would appear to have been some confusion in the mind of the Magistrate as to what that presumption is it is necessary to point out that it is to the effect that the person found in possession is to be "presumed until the contrary is proved to be assisting in a public lottery then in progress". It is, I hope, unnecessary to observe that in the nature of things nobody could be assisting in a public lottery not in progress, at least not in the present state of our knowledge relating to time. The words mean what they say. They mean that the person found in possession is to be presumed to be assisting in a public lottery which is in progress at the time he is found in possession. And it is for him to rebut the presumption. He can do so in two ways. Either he can give some innocent explanation which is believed or, as was pointed out by Thorne C.J. in the case of

Public Prosecutor v. Lee Fook⁽¹⁾, he can point to something in the material found which in itself is sufficient to rebut the presumption as, for example, if the material found consisted of printed tickets which on the face of them referred to a lottery which was some years old. But until he rebuts the presumption it retains its full force against him. In the present case the appellant made no attempt to give any explanation and there is nothing in the nature of a date on any of the duplicates found in the shop. In the circumstances, there can be no doubt that the presumption contained in section 11 arose against him if he was found in possession of these duplicates.

It is unfortunate that in the discussion of this part of the case the Magistrate seems to have attached some importance to the original ticket which was produced and which bore a date. Some of the evidence relating to that original ticket was clearly inadmissible but its production was wholly irrelevant for there was not a scrap of evidence to shew that the date was on the ticket before it came into the possession of the person who handed it to the detective who produced it and, indeed, the difference in writing implement which has been mentioned ought to have created a very definite suspicion to the contrary. But though the Magistrate was wrong in paying any attention to this original ticket he only did pay attention to it because he would seem to have misconceived the nature and extent of the presumption which arose from possession of the duplicate tickets and in the circumstances his error in this regard cannot affect the validity of the conviction.

There remain, however, the question of possession and here I regret to have to say the Magistrate has failed to direct himself adequately as to the law. He has found that the accused had a physical power of disposal over the duplicates, that he knew the duplicates were in the book in the basket and that he knew the nature of the duplicates. These facts, however, are not sufficient to support the inference of possession. No doubt he felt he was basing himself on the judgments of Gordon-Smith Ag. C.J. in the case of *Toh Ah Lam and Mak Thim v. Rex*⁽²⁾ and Spenser Wilkinson, J. in the case of *Lee Boon Gan v. Regina*⁽³⁾. It is to be observed, however, that in both these cases the accused persons had actual physical control of the articles in question and that in both cases the Court was only concerned with the additional ingredients necessary to make possession criminal. Of course there can be no possession without knowledge and there can be no possession without some power of disposal but an essential ingredient of all possession is that there must be an intention as owner in case of need to exercise that power to the exclusion of other persons.

In my experience there is no question which Magistrates find more difficult to deal with than this question of what amounts to "possession" for the purposes of the criminal law. Much of this difficulty arises from a failure to appreciate that in reality there are two separate questions involved. The first is whether the accused party was in possession of the article in question and the second by reason of the application of the maxim *actus non facit reum nisi mens sit rea* is whether he had knowledge of the nature of the thing possessed.

"Possession" itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edition, page 304):—

"A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need."

To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table. It must also be shewn that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some *animus possidendi*. Intention is a matter of fact which in the nature of things cannot be proved by direct evidence. It can only be proved by inference from the surrounding circumstances. Whether these surrounding circumstances make out such intention is a question of fact in each individual case. If a watch is in my pocket then in the absence of anything else the inference will be clear that I intend to deal with it as if it were my own and accordingly I am in possession of it. On the other hand, if it is lying on a table in a room in which I am but which is also frequently used by other people then the mere fact that I am in physical proximity to it does not give rise to the inference that I intend to deal with it as if it belonged to me. There must be some evidence that I am doing or having done something with it that shews such an intention. Or it must be clear that the circumstances in which it is found shew such an intention. It may be found in a locked room to which I hold the key or it may be found in a drawer mixed up with my own belongings or it may be found, as occurred in a recent case, in a box under my bed. The possible circumstances cannot be set out exhaustively and it is impossible to lay down any general

rule on the point. But there must be something in the evidence to satisfy the Court that the person who is physically in a position to deal with the thing as his own had the intention of doing so. It is true that in prosecutions under the Dangerous Drugs Ordinance a lack of evidence in this connection may be made good by the statutory presumptions contained in that Ordinance. But there are no such presumptions in the Common Gaming Houses Ordinance nor are there any such presumptions in relation to possession of stolen property.

Once possession is proved then before the accused person can be convicted it is necessary in addition to prove *mens rea*. And for this purpose as was pointed out by Gordon-Smith Ag. C.J. in the case of *Toh Ah Lam and Mak Thim v. Rex*⁽²⁾, *supra*, it is necessary to prove that the person in possession knows the nature of the thing possessed.

If the thing, as in *Toh's* case, is in a box which itself is in the possession of the accused it must be proved that he knew what was in the box. If, as in *Lee's* case, it was a lottery document it must be proved that he knew it was a lottery document. Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances. Again the possible variety of circumstances which will support such an inference is infinite. There may be something in the accused's behaviour that shews knowledge, or the nature of the thing may be so obvious that it is possible to say "he must have known what it was" or, again in cases under the Dangerous Drugs Ordinance, there may be a statutory presumption which fills a gap in the evidence.

Applying these observations to the present case it is clear that the Magistrate did not apply his mind to the question of whether the circumstances clearly shewed that the accused had the intention of dealing with the counterfoils found in the account book as if they were his own, that he had any *animus possidendi* in relation to them.

And for myself I am not prepared to say that had he directed himself to the question he would necessarily have come to the conclusion that possession was made out. No doubt he might well have come to the conclusion that the accused was in possession of the blank note-book in front of him on the table. But the question to be decided was whether he was in possession of the similar note-book found in the account book in the waste-paper basket and I doubt whether

possession of the blank book would necessarily support the inference of possession of the other book. If the accused had been doing something with the blank book or if it had contained entries similar to those in the other book there might well have been support for such an inference. But there was nothing of the sort. There was nothing to shew what he intended to do with the blank book and there was nothing written in it. It could be used for writing out lottery tickets but there was nothing so distinctive about it as to point to its being about to be used for such a purpose. All that could be said about it was that it was similar to a book which somebody using the same premises had used for the purposes of a lottery.

In the circumstances the conviction cannot stand. It will be set aside and an order of acquittal and discharge entered.

Appeal allowed.

CHEW CHENG LYE v. REG.

[A. Cr. J. (Whitton J.) November 2, 1956]

[Singapore — Magistrate's Appeal No. 157 of 1956]

Penal Code ss. 34 & 379 — Common intention — Criminal act done by several persons — Theft.

In this case the appellant and another person were charged with the offence of theft of a bicycle at the five foot-way of North Bridge Road. The facts shortly were as follows: About 5.30 p.m. on April 11, 1956 a police constable and a detective saw the appellant and the other man walking along Victoria Street and the officers' suspicions were aroused when they noticed the two men examining bicycles and conversing together. As a result of their suspicions they followed the men. The two men entered North Bridge Road. The other man walked along the five foot-way and when he came in front of house No. 359 North Bridge Road he placed his hand on a bicycle and started to push it along. The police constable ran towards him. The man then let go of the bicycle and ran away. The constable chased him and arrested him. Meanwhile the appellant who had been walking on the road near the drain, also started to run and was arrested by the detective. The other man and the appellant were both convicted of theft of the bicycle.

Held: (1) one of the requisite conditions to bring section 34 of the Penal Code into operation is that a criminal act is done by several persons and before the section can be applied there must therefore be more than a joint venture to commit a crime; it must be established that more than one person participated in the commission of the criminal act which forms the subject of the charge, although in certain circumstances mere presence may constitute participation; (2) in this case it had not been shown that the appellant had participated in the criminal act and therefore the conviction must be quashed.

Case referred to:—

- (1) *Mahbub Shah v. R.* A.I.R. 1945 P.C. 118; L.R. 72 I.A. 148.

MAGISTRATE'S APPEAL.

Appellant in person.

S. E. Teh (Crown Counsel) for the respondent.

Whitton J.: — This appeal raises an unusual point in connection with the doctrine of common intention.

The appellant was convicted with another male Chinese, Chiang Koon Sun, of the theft of a bicycle on the five foot-way of North Bridge Road on 11th April 1956. The facts found by the learned District Judge — and in my view the evidence justified his findings — were, shortly as follows. About 5.30 p.m. on the day in question a police constable and a detective saw these two Chinese walking along Victoria Street and the officers' suspicions were aroused when they noticed the two men examining bicycles and conversing together. As a result of their suspicions they followed the men. The two Chinese entered North Bridge Road. Chiang walked along the five foot-way and when he came in front of house number 359 he placed his hand on a bicycle and started to push it along. The Police constable ran towards him. Chiang let go of the bicycle and ran away. The constable chased and arrested him. Meanwhile the appellant, who had been walking on the road near the drain, also started to run and was arrested by the detective.

On these facts the learned District Judge holding the doctrine of common intention applied convicted both the accused. He says: "I was satisfied on the evidence for the prosecution that this was a joint venture on the part of the accused and the other person. I found that the accused and the other person had set out that afternoon to steal bicycles. The actual moving of the particular bicycle in this case was done by the other accused person, but accused was present at the scene and he was clearly equally and jointly liable for the theft with the other person". I fully agree with this view of the facts, but to my mind the legal liability of the appellant is not quite so simple a matter as the District Judge appears to have thought. Section 34 of the Penal Code reads:—

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone."

The difficulty I find in its application to the present case is this. One of the requisite conditions to bring the section into operation is that "a criminal act is done by several persons." As *Ratanlal* says (Ed. 18 p. 60) it "contemplates the case where more persons than one share in the doing of the act". Now in the present instance the only criminal act was the moving (or theft) of the bicycle by Chiang. So even if it be conceded, as I think it can correctly be, that the common intention to steal bicycles, although there was no common intention